

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:

SAEID SHAFIZADEH

COMPLAINANT

CASE NO.: 2003-00400

RECEIVED

JAN 05 2004

PUBLIC SERVICE
COMMISSION

v.

CINGULAR WIRELESS-KENTUCKY

DEFENDANT

RESPONSE TO COMPLAINANT'S MOTION TO STRIKE

BellSouth Mobility, LLC, d/b/a Cingular Wireless ("Cingular"), vehemently denies the allegations in Complainant's Motion to Strike Sham and Frivolous Pleading ("Motion") and respectfully requests the Commission to deny Complainant's Motion.

Specifically, Complainant asks the Commission to strike two sentences from Cingular's answer to his complaint. (Motion, p. 5). Those sentences read as follows:

Cingular admits that Cingular has advised Complainant may set up a password of his choosing on his account so that the last four digits of Complainant's Social Security number will not be used. Cingular admits that Complainant has not availed himself of this option.

They were included in Cingular's answer two times, in both paragraphs 33 and 34.

The ground for the Motion is claimed to be that this portion of the answer "was not interposed as a valid, meritorious and good faith defense to Consumer's claim, and therefore, sham" (Motion, p. 1). However, those sentences were responsive to the averments to which they were addressed.

Paragraph 33 of the Complaint alleges that:

Consumer has put Cingular on express notice to cease and desist from using his

social security number for discussing service disputes.

These two sentences were put in the answer to that claim to note that Complainant could change his password to something else, but that he has not bothered to do so.

Paragraph 34 of the Complaint charges that:

Cingular has refused to comply with the Consumer's demand and it has willfully and deliberately continues to use the Consumer's social security number as a password to discuss service disputes.

This averment is closely related to the preceding one and therefore the answer is the same. Once again, these two sentences were included in the answer to point out that Complainant had the ability to change his password and apparently chose not to.

Perhaps Complainant feels that Cingular should have done nothing more than admit or deny his allegations. But Rule 12.02 of the Kentucky Rules of Civil Procedure ("CR") requires that "[e]very defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto if one is required" That is exactly what Cingular has done by including these two sentences; it has asserted defenses to the averments set forth in paragraphs 33 and 34 of the complaint.

Indeed, the impropriety of Complainant's motion is shown by the document itself. It notes that a "[p]leading may be stricken as 'sham' when its allegations appear false on the face of the pleading." (Motion, p. 5). Although Complainant claims these two sentences are "an outright lie and fabrication" and "categorically denies" the facts asserted in them, he acknowledges that one must look beyond the answer to determine whether his version or Cingular's version of these facts is correct when he states that "discovery will support Consumer's assertion." (Motion, p. 2).

In his Motion, the Complainant essentially contends that Cingular's defenses contained in the sentences at issue are not true. Just because the Complainant disagrees with Cingular's

allegations, however, is not sufficient basis to strike those allegations pursuant to CR 12.06. As demonstrated above, the sentences at issue were responsive defenses to the allegations in the complaint, which defenses Complainant admits he will need discovery to prove false. The Complainant has not demonstrated that Cingular's defenses are false on their face. Instead, the Complainant merely reveals that a factual dispute exists in this proceeding that must be determined by the Commission. Under these circumstances, the Complainant's motion to strike is without merit.

WHEREFORE, Cingular Wireless, LLC respectfully requests that the Commission deny Complainant's Motion to Strike.

Respectfully submitted,

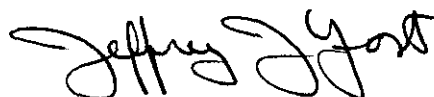


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CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Response was served by regular U.S. mail postage prepaid, on this 5th day of January, 2004, on:

Saeid Shafizadeh, Complainant
Attorney at Law
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